No. 84-1044 (9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICI CURIAE* OF PACIFIC BELL, *ET AL.* IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANT

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QUESTION PRESENTED

Does an order of a state public utilities commission violate the First Amendment of the Constitution of the United States by compelling a privately-owned public utility to include in its monthly billing envelope the messages of a third party?

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INTEREST OF THE *AMICI CURIAE*, PACIFIC BELL, *ET AL.*

Pacific Bell is a privately-owned public utility company providing telecommunications services to a majority of the people of the State of California. The telecommunications services it provides and the rates it charges therefor in California are subject to the regulation of the appellee, the Public Utilities Commission of the State of California ("CPUC" or "Commission"), except insofar as that authority may be preempted by the Federal Communications Commission.

As is the case with Pacific Gas & Electric Co. ("PGandE"), complaints have been filed with the Commission seeking to compel Pacific Bell to make available to third parties the use of Pacific Bell's mailings to its customers for their own communications, both additional to and supplanting Pacific Bell's communications. The Pacific Bell cases before the Commission have long since been fully briefed and argued, but no opinion or order has issued from that agency. Obviously, any disposition of this case on its merits will seriously affect the Commission's judgment in the Pacific Bell cases, although there

are constitutional questions raised by Pacific Bell other than the one proferred here by PGandE's jurisdictional statement. As *amici,* of course, we confine ourselves here to the question presented by the appellant, whether the action of the Commission violates the mandates of the Speech and Press Clauses of the First Amendment.

General Telephone Company of California, Southern California Edison Company and Southern California Gas Company, also *amici curiae* here, are the three largest public utility companies in the State of California, with the exceptions of PGandE and Pacific Bell. None of these three utility companies has yet been requested by third parties to use the utilities' mailings for their own communications. But these utilities are regulated by the CPUC and would be subject to any rule validated by this Court, and the outcome of these proceedings will have a significant impact upon their operations.

We have received the written permission of the parties to this case to file this brief *amici* and these have been filed in the office of the Clerk.

ARGUMENT

I. THE ISSUE RAISED BY THE JURISDICTIONAL STATEMENT PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL CONSTITUTIONAL LAW.

The First Amendment question raised by PGandE's jurisdictional statement presents a substantial federal question in two senses. It is substantial because it is of nationwide consequence. The issue has already been raised in many States (Jurisdictional Statement, p. 10), as well as in California, and there is every likelihood that it will arise in every State of the Union with regard to every privately-owned public utility.

The question is substantial, too, because it implicates the most fundamental premises of the Free Speech and Free Press Clauses of the First Amendment. The essence of the First Amendment provisions is that no government in the United States may tell a person what he *must* speak or write. And certainly no government is entitled to inhibit that speech prior to publication. Corporations, including public utilities, are entitled to the protections afforded by the First Amendment. *Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U.S. 530 (1980); and *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n,* 447 U.S. 557 (1980). The Commission's order in this case violates these long-accepted and vital commitments to American freedom contained in the Constitution. It requires PGandE to include in PGandE's mailings to its customers messages that are not PGandE's ideas or propositions and, to a large degree, are likely to be antithetical to PGandE's interests and beliefs. It also requires PGandE to limit the use of its own mail to communicate with its customers in order to accommodate the messages of the intervenors. Thus, the Commission both commands PGandE to ventilate views that are not its own and may be alien to it and inhibits it from publishing views that are its own and which it believes to be in the best interests of its consumers and itself.

That these facts raise substantial questions under the First Amendment was acknowledged by the Commission when it first invited an application for the kind of order that it later issued and which is the subject of appeal in this case: "We caution, however, that we will not lightly adopt such an order and that *the considerable First Amendment problems must be fully addressed* in such application." (Jurisdictional Statement, p. 6)

II. PGandE IS A PRIVATELY-OWNED PUBLIC UTILITY REGULATED BY THE CPUC. THE EQUIPMENT AND FACILITIES THAT IT USES TO PERFORM ITS SERVICES OF SUPPLYING GAS AND ELECTRICITY TO CALIFORNIA CONSUMERS BELONG TO PGandE AND NOT TO THE COMMISSION OR THE CONSUMERS OF ITS SERVICES OR THE PUBLIC.

The decision of the Commission is predicated on two erroneous premises: first, that the space in the envelopes in which PGandE mails its bills to its consumers does not belong to PGandE; and second, that the space in the envelopes in which PGandE mails its bills to its consumers constitutes a public forum which the Commission somehow controls in terms of who may use it and when. Both premises are in error. Even if PGandE were publicly owned, the space in the envelopes would not constitute a public forum.

The essence of a public utility is not that it or its property is owned by the public but that it provides products or services which must be made available to all who would purchase them without discrimination. To assure these results, services offered by the utility to the public are subject to the terms, conditions and rates fixed according to due process by the state regulatory agency. Provision of mailing services is nowhere regarded as a public utility function. It is a business that anyone is free to enter or abandon at will, and its prices, terms and conditions are fixed by the open market of buyers and sellers.

Private property may not be commandeered by a State or its agencies except pursuant to the terms of the Fifth Amendment (as applicable to the States through the Fourteenth Amendment), which provides in part: "nor shall private property be taken for public use, without just compensation." Thus, for example, if PGandE were to own an office building in which it housed its business operations, there could be no doubt that the Commission could not order it to turn over office space within that building for the use of such persons as the Commission might designate, however essential the office building might be to the supplying of utility services. It is simply not within a state regulatory commission's jurisdiction to direct a utility to devote its property to, or enter, a private venture such as mailing services. It is the utility-supplying function that the CPUC is authorized to regulate, not the property that is owned by the private corporation.

III. THERE IS NO COMPELLING STATE INTEREST TO BE SERVED BY THE COMMISSION'S TRANSGRESSION OF THE FIRST AMENDMENT RIGHTS OF PGandE.

That the Commission has invaded PGandE's First Amendment rights not to be censored in its speech and not to be compelled to speak what it chooses not to say is evident. The last refuge of the CPUC is that there is an overriding state interest that justifies this destruction of constitutional rights. But the only justification offered by the Commission for its order that both inhibits PGandE from expressing its views and compels it to express the views of third parties is that the Commission wants a plurality of voices to be heard by PGandE customers. It has, however, long since been made clear by this Court that such a rationalization is itself inconsistent with the First Amendment. "[T]he concept that government may

restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley* v. *Valeo,* 424 U.S. 1, 48-49 (1976). "[T]he implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years." *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 254 (1974). The argument of the Commission thus reduces itself to the absurd proposition that the invasion of PGandE's First Amendment rights is justified by what this Court says the First Amendment forbids.

The commercial contents of these mailing envelopes clearly do not make them subject to prescription or proscription, even by the government of the United States which provides the mail services, *Bolger* v. *Youngs Drug Products Corp.,* ____ U.S. ____, 103 S.Ct. 2075, 77 L.Ed.2d 469 (1983), no less by a state public utilities commission, *Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U.S. 530 (1980). Since the Commission's avowed objective is to publicize the views of self-appointed consumer advocates under the aegis of a PGandE communication, it fails to meet the first requirement of *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n,* 447 U.S. 557 (1980) that the restraint directly advance a legitimate and substantial state interest. The restraint, at best, only indirectly advances a state interest. *Id.* at 564. It matters not then that the Commission did not and could not show the necessity for this remedy as the most effective and least burdensome method for reaching its goal, as *Central Hudson* demands. *Ibid.* PGandE's mail is clearly not the only way for the intervenors to reach PGandE customers with whatever messages they may have for them. The U.S. mail, print, and electronic media are open to them as well as to anyone else. Pursuant to new legislation, consumer groups will be able to

request attorneys' and expert witness' fees in Commission proceedings. California Public Utilities Code § 1801, *et seq.* (January 1, 1985). Their powers of communication can be fully preserved without destroying PGandE's First Amendment rights.

Were the Commission allowed to succeed in requiring PGandE to carry in its mail the messages of the intervenors, we should indeed be reminded of the words of *Genesis,* xxvii.22: "The voice is Jacob's voice, but the hands are the hands of Esau."

IV. PGandE's ENVELOPES ARE NOT PUBLIC FORUMS AND CANNOT, IN CONSONANCE WITH THE FIRST AMENDMENT, BE COMMANDEERED FOR COMMUNICATIONS OF OTHERS, NOR CAN PGandE BE LIMITED IN ITS USE OF THEM FOR ITS OWN COMMUNICATIONS.

Even if PGandE's property were publicly owned, which it is not, that would not create a right of access to use it by anyone seeking to propagandize or proselytize. The concept of a physical area as a public forum for speech and debate derives from *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496 (1939), where Justice Roberts described the concept in this way:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute but relative, and must be exercised in subordination to the general comfort and convenience, and in

consonance with peace and good order, but it must not, in the guise of regulation, be abridged or denied. *Id.* at 515-16.

The concept of making public areas available for those who wish to use them for purposes of communication has been expanded by this Court to some privately-owned premises which have been opened and committed to public use by the private owners. *See, e.g., Marsh* v. *Alabama,* 326 U.S. 501 (1946); *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U.S. 308 (1968), which was qualified or overruled in *Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972); *PruneYard Shopping Center* v. *Robins,* 447 U.S. 74 (1980). (The last of these cases has been read by Professor Archibald Cox not as an expansion of speech rights but rather as one "accommodating the law of trespass to modern conditions." *See* Cox, *The Supreme Court, 1979 Term: Foreword: Freedom of Expression in the Burger Court,* 94 Harv. L. Rev. 1, 48 (1980).)

The mere fact of public ownership, even of a medium of communication, does not create the right to its use or the determination of its use by other than its proprietors. Clearly neither the United States Reports nor the Congressional Record need be opened to the expression of views other than those of the Justices in the one case and Congress in the other, although both are publicly owned and certainly arouse a diversity of views among citizen readers and critics. *Cf. Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974); *Perry Educ. Ass'n* v. *Perry Local Educ. Ass'n,* ____ U.S. ____, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983); *Avins* v. *Rutgers, State University of New Jersey,* 385 F.2d 151 (3d Cir. 1967), *cert. denied,* 390 U.S. 920 (1968).

There is certainly no evidence in the jurisprudence of this Court that a State is free to make a public forum for speech out of property that a private owner has never opened to the public

for its use. Reliance on *PruneYard* for that proposition is certainly misplaced. This Court made it clear that the result there was predicated on the fact that the shopping center in question was not reserved for the private use of the owner. 447 U.S. at 87. This had two implications: first, that the speaker was there by the owner's implied invitation; and second, that the space was not subject to being regarded in such a way that all activities conducted thereon would be deemed to have the sanction of the property owner. Certainly there has been no invitation from PGandE to make use of its mail, nor can there be any doubt that the mail sought to be used carries the implied imprimatur of PGandE.

There are two other important distinctions. *PruneYard's* speaker was not selected by the State; consequently, there was no danger of governmental discrimination for or against a particular message. And in *PruneYard,* the Court found that the speaker's use of the shopping center did not substantially interfere with the owner's use of it. There can be no doubt that the Commission will decide which organizations have access to PGand E's mail, nor that the Commission proposes to displace PGandE as well as to install its antagonists' views in that mailing. It was, and presumably remains, this Court's position that a "state in the exercise of its police power may adopt reasonable restrictions on property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provisions." 447 U.S. at 81. Here not only is there a taking of PGandE's property without compensation, there is a clear infringement on PGandE's First Amendment rights as well.

CONCLUSION

Amici curiae, Pacific Bell, *et al.*, respectfully submit that, for the reasons heretofore stated, this Court should note probable jurisdiction on this appeal, set the case for briefing and argument, and reverse the judgment below.

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